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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 325

LOUIS A. NEGRE,

Petitioner,

—against—

STANLEY R. LARSEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF LIEUTENANT LOUIS P. FONT,
AMICUS CURIAE**

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Interest of the Amicus

This brief is submitted with the consent of the petitioner and of the respondent.*

Amicus is a First Lieutenant in the United States Army. He is the plaintiff-appellant in the case of *Font v. Laird*, which is presently pending in the Court of Appeals for the Fourth Circuit, on appeal from a decision by the United States District Court for the District of Maryland. In the

* Letters of consent from the Solicitor General and the attorney for the petitioner have been filed with the Clerk.

latter decision, the District Court, Hon. Alexander Harvey, II, U.S.D.J., rendered an opinion denying a petition for a writ of habeas corpus, by which Lieutenant Font sought review of the Army's decision refusing to discharge him as a "selective" conscientious objector. — F. Supp. —, Civ. No. 70-716H (D. Md. July 24, 1970).

Lieutenant Font's interest as *amicus curiae* in this case stems from the fact that any decision by this Court may seriously, if not conclusively, affect the outcome of his case.

This brief seeks to present little additional legal argument beyond that which has already been presented by the petitioners in the present case and in the companion case of *Gillette v. United States*, No. 85, October Term, 1970. Rather, it is felt that it may be helpful to the Court to have before it, in ruling on questions of selective conscientious objection, the factual record of Lieutenant Font's long personal history of very active, traditional religious involvement, religious training, and religious belief, which has resulted in his claim of selective conscientious objection.

It is with these considerations in mind that this brief is respectfully submitted.

Statement of the Case

Amicus is a 1968 graduate of the United States Military Academy at West Point. Lt. Font entered West Point in 1964, and in the ensuing four years at that institution he compiled a most favorable record in all areas, receiving numerous honors and finishing as a Distinguished Graduate in the top 5% of his class, ranking 31st in a class of 706 members. This ranking included both military aptitude and physical education, as well as academic achievements.

Because of his excellent record, amicus was selected as one of the nine cadets to represent West Point in the Rhodes Scholarship competition. Among his other honors, as a junior, in August, 1966, he was chosen to represent the United States Military Academy in an exchange program with the Mexican Military Academy in Mexico City, Mexico. In September of 1967 he was selected as one of four cadets to represent the United States and the Military Academy in Santiago, Chile, in military ceremonies in that country. Lt. Font served during his senior year as Adjutant of a Cadet Battalion. Moreover, he was one of the few cadets whose record contained not a single instance of exceeding the allowed number of demerits in any month.

Following his graduation from the Academy in June of 1968, the Academy and the Army, on the basis of Lt. Font's outstanding record, endorsed him to attend graduate school, and he was accepted at Harvard University for two years of study at the John F. Kennedy School of Government, leading to a Master of Arts degree in Public Administration. This course of study commenced in the autumn of 1968 and was to terminate in June of 1970. During his period of study at Harvard, however, amicus gradually came to the realization that, like petitioner Louis Negre, he was compelled by his most deeply felt conscientious beliefs to seek discharge from the Army as an objector to participation in the Vietnam War in any form. Consequently, after a period of the most careful reflection, he submitted on February 27, 1970, an application for discharge from the Army as a conscious objector pursuant to the provisions of Army Regulation 635-20 (hereinafter AR 635-20), the regulation which establishes the procedures for dealing with conscientious objectors who are members of the Army.

Excerpts from amicus' application, and relevant supporting papers, are attached as Appendix "A" of this brief.

The essence of Lt. Font's claim of conscientious objection was set forth in the following excerpts from his aforementioned application:

"The underlying premise of my religious beliefs is that human life is of value, of high value, of sacred value. Life is precious and is to be cherished and respected. Life is a divine spark, a gift of God that knows no color or creed, like love. Snuffing out a divine spark—taking the life of another human being even in the hope of saving others, even in a just war—is, at best, of marginal morality. My religious beliefs compel me to believe that the gross and indiscriminate level of violence applied in Vietnam tips the moral balance strongly on the side of the immoral, of unjustness, and therefore the taking of any life in Vietnam, or contributing to that effort, is impossible for me. To me, the Commandment 'Thou shalt not kill' at a very minimum points to the inherent sanctity and worth of life. If my Methodist upbringing and belief means anything at all, it certainly means—it *must* mean—that a person's life is of value.

The Golden Rule, 'Do unto others as you would have them do unto you,' compels me to view the Vietnam war from the standpoint of the victim, the Vietnamese peasant and the American soldier. I am convinced that it makes no difference whatsoever to the Vietnamese who looks up into the sky and sees silver napalm canisters tumble down toward him, whether the napalm falls because the United States government loves him or hates him or is liberating him or pacifying him. The

point is that the bombs fall and the human being is dead—and with him a trace of mankind and humanity. In the words of John Donne, the English poet, 'No man is an Island, entire of itself; every man is a piece of the continent, a part of the main . . . any man's death diminishes me, because I am involved in mankind . . .'

It is only after long and careful study, meditation, and prayer with my God that I have come to these conclusions. I have had to ask myself some difficult and grueling questions: Given that I regard the Vietnam war as immoral, can I, should I accept assignment to Vietnam, even if to sit behind a desk in Saigon? Could I perform my job with the initiative and high performance expected of a West Point graduate? Does a moral man, whose religious beliefs compel him to find the Vietnam war immoral, remain in the Armed Forces that wages that war? Where do my loyalties lie when there exists a clear conflict between my duty to God and my duty to my country?

Over the last several months I have sought answers to these questions in religious readings and other books, in discussions with my friends, in discussions with theologians, but always, in the sound of silence the questions return to gnaw at my conscience. When I consider this ordeal, the words of the Greek poet, Aeschylus, seem appropriate:

Even in our sleep, pain
which cannot forget,
falls drop by drop upon the heart until,
in our despair, against our will,
comes wisdom through the
aweful grace of God.

My 'wisdom,' my irrevocable and undebatable conclusion, my deepest emotions founded on my religious belief, compel me to reject participation in the Vietnam war as immoral . . . I feel this with my whole being. I feel this with the same sort of total awareness that compelled John Wesley, the founder of Methodism, to separate himself from the Anglican Church on grounds of conscience. To be able to live with myself and others, I must file this claim. The following passage from Luke, ch.6, v.49, illuminates my position: 'But he that heareth, and doeth not, is like a man that without a foundation built a house on the earth; against which the stream did beat vehemently, and immediately it fell; and the ruin of that house was great.' Were I to do nothing, or were I to allow my conscience to be violated, I would no longer be of any value to myself or to the country that I cherish" (A. 6-8).

The sources of amicus' conscientious objection, as set forth in his application, are many and varied. He was raised in a devout Methodist home and his father is a lay preacher in the Methodist Church. As a youth in Kansas City, Missouri, amicus was active in Methodist Church activities, serving as president of the local Methodist Youth Fellowship (A. 14-15). As a Boy Scout he won many honors, including the God and Country Award (A. 16). Of primary importance to his beliefs are the principles imparted to him as a West Point cadet which were embodied in the West Point prayer:

"O God, our Father, Thou Searcher of Men's Hearts, help us draw near to Thee in sincerity and truth. May our religion be filled with gladness and may our worship of Thee be natural.

Strengthen and increase our admiration for honest dealing and clean thinking, and suffer not our hatred of hypocrisy and pretense ever to diminish. Encourage us in our endeavor to live above the common level of life. Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won. Endow us with courage that is born of loyalty to all that is noble and worthy, that scorns to compromise with vice and injustice and knows no fear when truth and right are in jeopardy. Guard us against flippancy and irreverence in the sacred things of life. Grant us new ties of friendship and new opportunities of service. Kindle our hearts in fellowship with those of a cheerful countenance, and soften our hearts with sympathy for those who sorrow and suffer. Help us to maintain the honor of the Corps untarnished and unsullied and to show forth in our lives the ideals of West Point in doing our duty to Thee and to our Country. All of which we ask in the name of the Great Friend and Master of men. Amen" (A. 11-12).

Annexed to Lt. Font's conscientious objector application were numerous letters from theologians, clergymen and military officers who attested to the deeply religious nature of his conscientious objector beliefs and to his sincerity in professing these convictions. Among the eminent and highly respected theologians and clergymen who wrote letters in Lt. Font's support were Dr. John M. Swomley, Jr., Professor of Christian Ethics at St. Paul's School of Theology, Kansas City, Missouri; Dr. Paul Deats, Jr., Professor of Social Ethics at Boston University School of Theology; Dr. Charles C. Price, Preacher to the University

of Harvard; Dr. Robert H. Hamill, Dean of the Chapel of Boston University; Dr. Elmer Brown, a Quaker Minister in Cambridge, Mass.; and Rabbi Herman Pollack, Adviser to the Hillel Society at Massachusetts Institute of Technology.

Representative of the letters written by these distinguished religious leaders is that of Dr. Swomley, who has counselled many hundreds of young men concerning conscientious objection and who stated that he was most impressed by Lt. Font's "earnest sincerity"; he wrote further that, of the many men he has seen regarding conscientious objection, "[N]one have seemed to me to arrive at a position of conscientious objection more honestly and with a greater sense of all that is involved" (A. 28).

Of the military personnel writing in amicus' behalf, Major C. P. Hutton, on active duty in Vietnam as Assistant Chief of Staff of an armored infantry division, wrote that while he does not agree with Font's beliefs, "I am certain his convictions are sincere," and recommended that the application be approved (A. 33).

Air Force Major James R. Murphy, Headquarters United States European Command, a former instructor of amicus at West Point, wrote:

"I had no doubts concerning the personal sincerity of his convictions, the loftiness of his ideals, the intellectual prowess by which he arrived at his conclusions, and the moral rectitude of his character" (A. 30-31).

Subsequent to the filing of his application amicus was summarily removed from his assignment at Harvard University and ordered to report for new permanent assignment to the Deputy Adjutant General at First Army Head-

quarters, Fort George G. Meade, Maryland. Amicus continued to be stationed at Fort Meade during the processing of his application.

On March 18, 1970, pursuant to AR 635-20, ¶4c, Lt. Font was interviewed by an Army psychiatrist, who specifically found that he was sincere in presenting his conscientious convictions. Pursuant to the same regulation he was also interviewed by Major Billy M. Whiteside, a Methodist chaplain, on March 18 and March 20, 1970. Chaplain Whiteside submitted a recommendation evincing the strongest belief in the profound depth and religious character of amicus' beliefs, stating in part as follows:

"a. I, personally, find no basis on which to question nor doubt the sincerity of Lieutenant Font in his convictions regarding his course of action.

b. It is quite evident that the primary source of his convictions is religious and his interpretation of Christian principles and ideals are in keeping with the fundamental teachings he received in his home and church while growing up.

c. I was deeply impressed with his sincerity and the analytical formulation of his conclusion."

On April 14, 1970, pursuant to AR 635-20, ¶4d, a hearing on the application for discharge was held at Fort Meade, Maryland, before Major Donald E. Cukjati, who received extensive testimony under oath both from Lt. Font and from a number of witnesses, all of whom repeated in the strongest terms their unqualified belief in Lt. Font's sincerity. Major Cukjati submitted his recommendation on April 22, 1970, finding Lt. Font to be unquestionably sincere

in his beliefs but recommending disapproval of the application "since selective conscientious objection is not authorized under the provisions of paragraph 3b(4), AR 635-20."

On April 22, 1970, Lt. Font's conscientious objector application together with all of the recommendations referred to above, was forwarded to the Department of the Army in Washington, D. C. by Col. H. J. Webb. Col. Webb, acting for Gen. Jonathan O. Seaman, Commanding General of the First United States Army, Ft. George G. Meade, recommended disapproval of the application because selective conscientious objection is barred by ¶3b(4), AR 635-20.

On June 12, 1970, amicus received notification that his application for discharge as a conscientious objector had been disapproved. The reasons stated for the disapproval by the Army review board were as follows:

"The applicant lacks the depth of sincerity to qualify for discharge as a conscientious objector under the provisions of AR 635-20. Further, the applicant's claim is based on objection to a particular war. Paragraph 3b(4) AR 635-20."

At the same time amicus received orders to report to Ft. Benning, Georgia, on June 18, 1970, for Officers Training Course, a combat preparatory assignment; orders were also issued for him to report to the 176th Replacement Company, APO San Francisco, on September 28, 1970, for shipment to Southeast Asia.

For the reasons set forth above, Lt. Font determined that the order directing him to report to Ft. Benning and the order directing him to report for shipment to Southeast Asia, or any similar order, would be in direct and serious

conflict with his most deeply held conscientious convictions. Therefore, on June 16, 1970, Lt. Font petitioned the United States District Court for the District of Maryland for a writ of habeas corpus to review the Army's denial of his petition for discharge and further seeking an order restraining and enjoining the military authorities from attempting to enforce the above mentioned orders, from taking any other action inconsistent with his religious and conscientious beliefs pending the determination of his petition for habeas corpus, or from instituting court martial or any other disciplinary proceedings against him for refusing to perform duties relating to combat or combat preparation during the pendency of the litigation.

On July 24, 1970, subsequent to a hearing on the merits of amicus' petition, the District Court, Hon. Alexander Harvey, II, U.S.D.J., rendered a decision specifically finding that there was no basis in fact for the board's assertion that Font's beliefs were not sincerely held. *Font v. Laird*, — F. Supp. —, Civ. No. 70-716H (D. Md. July 24, 1970). (Slipsheet opinion, p. 7.) However, the District Court declined to grant the writ of habeas corpus, holding that there was neither a statutory nor a constitutional requirement that the beliefs of selective conscientious objectors be recognized. The decision of the District Court is presently being appealed by Lt. Font to the Court of Appeals for the Fourth Circuit. During the pendency of the appeal, the order of the District Court restraining the military authorities from taking any actions inconsistent with amicus' beliefs was expressly continued in effect.

Lt. Font presently continues to be stationed at First Army Headquarters at Ft. George G. Meade, Maryland,

where he has had various assignments. His current assignment is as a housing inspection officer.

Amicus fears that, should this Court fail to recognize the beliefs of selective conscientious objectors such as Louis Negre and himself, he may be given an order which is in irreconcilable conflict with his conscience, and he may consequently be subjected to immediate court martial or other military discipline.

It is because of such serious adverse consequences which may devolve upon amicus, should the Court here affirm the decisions of the Second and Ninth Circuits below, that Lt. Font has obtained the consent of the parties in this case to offer this brief as a friend of the Court.

Summary of Argument

Amicus believes that a proper construction of Section 6(j) of the Military Selective Service Act of 1967 would find that the statute does not support the Army's attempt to refuse discharge to those whose consciences compel objection only to particular wars.

Amicus concurs in and supports the arguments presented by petitioner and the other *amicus curiae* in this case and the companion case of *Gillette v. United States*, No. 85, this Term, and argues in addition that even the Regulations drawn by the Selective Service authorities themselves, pursuant to the statute, appear to support the construction for which we contend.

Alternatively, amicus believes that if the statute and regulation are not so construed, they must be found to be in violation of constitutional requirements in at least three

respects: they operate as an establishment of religion, and as an abridgement of the free exercise of religion, both in violation of the First Amendment; and they also operate to bring about a failure of equal protection of the laws, in violation of the due process clause of the Fifth Amendment. Amicus believes that the facts of his own case make it incontrovertibly clear that present policies toward those who object to participation only in particular wars constitute religious discrimination.

ARGUMENT

I.

Section 6(j) of the Military Selective Service Act, properly construed, requires recognition of selective conscientious objection. Limiting language in the Department of Defense directive and the Army Regulation finds no support in the statute or the legislative history.

While fully concurring in and supporting the arguments set out in the briefs of petitioner and of the other *amici curiae*, we would also wish to bring to the attention of this Court the fact that the Selective Service administrators themselves, in drafting regulations pursuant to the Selective Training and Service Act of 1940 (54 Stat. 885), which contained language almost identical to that of the present Military Selective Service Act, 50 U.S.C. App. §456(j), appear to have placed on that language the same construction for which petitioner here contends.

Thus, in providing for the treatment of registrants who have been classified as I-A-O, those whose objection will not permit them to engage in actual killing but will permit

them to serve in noncombatant status, no mention is made of the words "in any form," for the I-A-O registrant's objection does not extend to "any form" of participation, but only to *some* forms of participation. 32 C.F.R. §1622.11.

Those who are classified in class I-O, on the other hand, are those who find that their consciences do not permit them to serve in the armed forces in any way, and they are to be called only for alternative civilian service: it is only when dealing with the I-O registrant that the regulations make reference to the registrant "opposed to participation in war in any form. . . ." 32 C.F.R. §1622.14.

This interpretation of the language of the statute has been upheld repeatedly in decisions of this Court and of lower federal courts. The problem has most commonly arisen in the context of deciding on the treatment to be accorded to Jehovah's Witnesses, who often freely acknowledge that they will fight in a war which they believe to be ordained by their God, but refuse to fight in any war not so ordained. Despite such admissions, the right of Witnesses to conscientious objector status has been affirmed by this Court, in *Sicurella v. United States*, 348 U.S. 385 (1955), and by six of the Circuit Courts of Appeals. See, e.g., *Bouziden v. United States*, 251 F.2d 728 (10th Cir. 1958), *Mayfield v. United States*, 220 F.2d 729 (5th Cir. 1955); *Shepherd v. United States*, 217 F.2d 942 (9th Cir. 1954); *United States v. Close*, 215 F.2d 439 (7th Cir. 1954); *United States v. Hartman*, 209 F.2d 366 (2d Cir. 1954); *Taffs v. United States*, 208 F.2d 329 (8th Cir. 1953), *cert. denied* 347 U.S. 928 (1954).

II.

It is unconstitutionally discriminatory, in violation of the First and the Fifth Amendments to the United States Constitution, for a statute to authorize conscientious objector status for objectors to all wars, but to deny such status to those in the position of petitioner.

We fully support and are in accord with the arguments of petitioner on this point. We would add only that the facts of amicus' case history, as set out in the Interest of the Amicus, *supra*, in the Statement of Case, *supra*, and in the Appendix to this brief, lend still further support to petitioner's contention that the recognition of religiously compelled selective conscientious objection is required under the free exercise and establishment clauses of the First Amendment, and the equal protection clause of the Fourteenth Amendment, as applied through the due process clause of the Fifth Amendment.

A reading of amicus' application for discharge renders it incontrovertibly clear that it is based upon his most deeply held religious beliefs, stemming from his lifetime of devotion to the principles of Methodism, and his determination to conduct his life according to the commands of his God.

That Lieutenant Font is not alone in his interpretation of the commands of his religion is demonstrated by the considerable support for his position which exists within the Methodist Church. In October, 1969, the Board of Christian Social Concerns of the United Methodist Church issued a statement which said, in part:

" . . . [W]e ask that all those who conscientiously object to preparation for or participation in *any specific war* or all wars be granted legal recognition and assigned to appropriate civilian service . . . " (Emphasis supplied.)

On June 12, 1970, the Kansas East Conference of the Methodist Church, the body of which amicus' local church in Kansas City is a part, also adopted, without dissent, the above statement as its own official stand on the issue of the objector to a particular war.

It is thus made manifest that to recognize the conscientious beliefs of the universal objector, and yet to fail to recognize the beliefs of one in the position of amicus or of petitioner in the present case, is to pick and choose among religious beliefs upon the basis of their content, an action which this Court has repeatedly held is not permitted to the government. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Moreover, by refusing to grant recognition to petitioner's and to amicus' religious beliefs, the government is attempting to abridge the free exercise of religion, which is also constitutionally forbidden. This is not a case where the government seeks to restrain the individual from performing a positive act, harmful to those interests which the government is charged with protecting, as was the situation in *Reynolds v. United States*, 98 U.S. 145 (1878), and in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944). Rather, the individual here seeks to refrain from performing an act, and the government wishes to compel him to do so, contrary to his religious convictions;

this the government has been repeatedly held not permitted to do, as in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Sherbert v. Verner*, *supra*; and *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515, remanded for further consideration in light of *Sherbert*, 375 U.S. 14, *modified* 267 Minn. 136, 125 N.W.2d 588 (1963).

Finally, by according to petitioner and those similarly situated different treatment from others, solely on the basis of an arbitrary and unjustifiable distinction between them grounded on the differing contents of their religious beliefs, the government is in direct violation of the standards mandated by the equal protection guarantee of the Fourteenth Amendment, *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Follet v. Town of McCormick*, 321 U.S. 573 (1944); *United States v. McFadden*, 309 F. Supp. 502 (N.D. Cal. 1970); *United States v. Bowen*, — F. Supp. —, 2 S.S.L.R. 3421 (N.D. Cal. Dec. 24, 1969); such a denial of equal protection constitutes a denial of the due process of law which the Fifth Amendment requires the federal government to accord to its citizens. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. McFadden*, *supra*; *United States v. Bowen*, *supra*.

CONCLUSION

For the reasons stated, 50 U.S.C. App. §456(j) and the corresponding Army Regulation should be construed so as to grant to selective conscientious objectors the same status and treatment as is accorded to so-called "universal" objectors.

In the alternative, if the statute and regulation are not so construed, they should be declared unconstitutional in their discrimination against some religious groups and in favor of others.

In either case, the judgment of the Court below should be reversed, and the requested discharge should be ordered granted to petitioner Negre.

Respectfully submitted,

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November, 1970.

* Attorneys for *amicus curiae* gratefully acknowledge the assistance of Mr. Steven Delibert, third year student at New York University School of Law.